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No. 765

In the Supreme Court of the United States

OCTOBER TERM, 1960

ESTATE OF RALPH G. MAY, MILDRED K. MAY, Executrix,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Tax Court (R. 22-30) is reported at 32 T.C. 386. The opinion of the Court of Appeals (Pet. 14-20) is reported at 283 F. 2d 853.

JURISDICTION

The judgment of the Court of Appeals was entered on November 2, 1960. (Pet. 14-20.) A petition for rehearing was denied on November 30, 1960. The petition for a writ of certiorari was filed on February 27, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

The decedent bequeathed the sole life use of his residuary estate to his wife, giving her the power to invade and use the principal "not only for necessities but generally for her comfort, happiness and well-being." Under applicable state law such a power does not authorize the holder to appropriate the principal as owner but is limited to consumption and use of the principal in good faith for the holder's own use and benefit. The question is whether the courts below were correct in holding that this power did not constitute a power in the widow to appoint to herself in all events as required by applicable provisions of the Internal Revenue Code and Treasury regulations and that hence the interest received by the widow could not qualify for the estate tax marital deduction authorized by Section 812(e) of the 1939 Internal Revenue Code as amended.

STATUTE AND REGULATIONS INVOLVED

The pertinent portions of Section 812(e) of the Internal Revenue Code of 1939, as amended, and Treasury Regulations 105, Section 81.47a are set forth in the Appendix, *infra*, pp. 11-17.

STATEMENT

All of the facts were stipulated (R. 13-21), and may be summarized as follows:

Ralph G. May, the decedent, a resident of New York, died on November 6, 1953. His last will and testament, which was admitted to probate on December 9, 1953 (R. 13, 23), provided, in part, as follows (R. 16):

> THIRD: I hereby give, devise and bequeath to my wife, MILDRED K. MAY, should she survive me the sole life use of all the rest, residue and remain-

> der of my property both real and personal wherever situated, with the right in the sole discretion of my said wife, to invade and use the principal not only for necessities but generally for her comfort, happiness and well-being. I direct that my said wife be given possession of said property and all thereof and that she be not required to give any bond or other security in respect thereto.

In addition, paragraph FOURTH of the decedent's will provided a gift over at the death of his widow of the residue of the property "if any there be, after said life use thereof by my said wife," in trust for the benefit of then living children and issue of deceased children. (R. 16-17.)

The value of the decedent's residuary estate passing under paragraph THIRD of his will was $245,657.68 prior to payment of federal and state estate taxes. (R. 14, 25). Decedent's executrix filed an estate tax return claiming thereon as a marital deduction under Section 812(e) of the 1939 Code, as amended, the sum of $127,295.26, constituting one-half of the adjusted gross estate as shown on the return. The Commissioner disallowed the claim for a marital deduction insofar as it was based upon the widow's interest in the residuary estate but allowed the amount of $9,682.69, representing joint property included in decedent's gross estate which passed outside the will to his widow as her absolute property. (R. 14, 15, 25.)

In an opinion reviewed by the entire court, the Tax Court held unanimously that the interest received by the decedent's widow under paragraph THIRD of the will did not qualify for the marital deduction. (R. 30.) On the estate's petition for review, the Court of Appeals affirmed. (Pet. 14-20.)

ARGUMENT

The decision below turns upon the particular provisions of the decedent's will as construed in the context of applicable local law. Under long-standing Treasury regulations twice followed by reenactment of the underlying Code provisions without substantial change, the decision is clearly correct; and, contrary to petitioner's assertions, not in conflict with that of any other Court of Appeals. There is no warrant for further review.

1. Section 812(e) of the Internal Revenue Code of 1939, as amended, (Appendix, *infra*, pp. 11-13) allows, in computing the federal estate tax, a deduction from the gross estate not to exceed 50% of the value of the adjusted gross estate, for certain gifts passing from a decedent to his surviving spouse. This marital deduction, however, is not available for gifts of life estates and "Other Terminable Interest[s]", defined in Section 812(e)(1)(B) (Appendix, *infra*, pp. 11-12) as interests passing to the surviving spouse but which upon lapse of time or the occurrence of a contingency will terminate and pass to any other person. It is undisputed that the interest of the surviving spouse in the instant case (a legal life estate, coupled with a power to invade and use the principal with remainder over) is "terminable" within the meaning of the statute and hence not available for the marital deduction unless it can qualify under Section 812(e)(1)(F) of the 1939 Code (Appendix, *infra*, pp. 12-13) which provides an exception to the terminable interest rule.

Section 812(e)(1)(F), as amended,[1] allows a deduc-

[1] Although Section 812(e)(1)(F) was amended by Section 93(a) of the Technical Amendments Act of 1958, P. L. 85-866, 72 Stat. 1606, 1668, such amendment did not affect the nature of the power of appointment described therein but merely conformed Section

tion for interests passing from a decedent to his surviving spouse—

> if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, * * * with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or the estate of such surviving spouse, or in favor of either * * *) * * *.

The subparagraph is applicable however—

> only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

The original regulations under this Section (Treasury Regulations 105, Section 81.47a, Appendix, *infra*, pp. 13-17), in language similar to that which appears in the current regulations, described the required power in the widow as one to appoint the corpus to herself as unqualified owner, "that is, in effect to dispose of it to whomsoever she pleases." (Appendix, *infra*, p. 16.) This requirement in the regulations accords both with the language of the statute and with the expressed congressional purpose in enacting Section 812 (e)(1)(F), *i.e.*, to secure a general uniformity

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812(e)(1)(F) to the provisions of the corresponding section of the 1954 Code, Section 2056(b)(5). S. Rep. No. 1983, 85th Cong., 2d Sess., p. 107 (1958-3 Cum. Bull. 922, 1028). The latter section, while making no change in the nature of the power of appointment from that then required under Section 812(e)(1)(F), extended its coverage to a specific interest in property in addition to an entire interest and also to such interests whether or not held in trust. S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 125, 475 (3 U.S.C. Cong. and Adm. News (1954) 4621; 4758); *Hoffman* v. *McGuines*, 277 F. 2d 598 (C.A. 3d).

of tax treatment of decedents' estates in both community property and common law states. In the former, of course, each spouse is an absolute owner of one-half of the property owned by the marital community. Only by possessing a power to appoint to herself as "unqualified owner * * * that is, in effect, to dispose of it [the property] to whomsoever she pleases", together with the right to all of the income for life, does the surviving spouse enjoy an interest which approaches that of a "virtual owner" of the property, a substantial equivalent to the interest of a surviving spouse in community property. S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 16 (1948-1 Cum. Bull. 331, 342).

Following promulgation of the initial regulations under Section 812(e)(1)(F), Congress twice reenacted the basic statutory provisions, once in the 1954 Code[2] and again in the Technical Amendments Act of 1958[3] without, for present purposes, material change. Under these circumstances the 1939 Code regulations may be taken as an authoritative construction of the underlying statutory provisions. *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U.S. 110, 115. The Courts of Appeals have favorably cited and applied the regulations. See *Hoffman* v. *McGinnes*, 277 F. 2d 598 (C.A. 3d), applying Sec. 20.2056(b)-5(g)(3) of the Treasury

[2] As indicated in footnote 1, the 1954 Code liberalized the marital deduction provision in 2 respects: first the widow's power could extend to a specific interest in property (where before an entire interest was required) and second the property subject to the power need not be held in trust (where before legal interests could not qualify). No change was made in the nature of the power of appointment required.

[3] See footnote 1, *supra*. Without these changes petitioner could not have maintained this action for it is clear that under the 1939 Code the legal life interest granted to the widow could not qualify for the marital deduction.

Regulations on Estate Taxes (1954 Code); see also *Commissioner* v. *Ellis' Estate*, 252 F. 2d 109 (C.A. 3d), and *Pipe's Estate* v. *Commissioner*, 241 F. 2d 210 (C.A. 2d), certiorari denied, 355 U.S. 814, applying Section 81.47a of Treasury Regulations 105.

In order to provide for the more liberal features of the Technical Amendments Act of 1958[4] which were made retroactively applicable to 1939 Code cases, the regulations have been modified in respects not here material. However, in addition, language has been added to the regulations describing the nature of the widow's required power as one to dispose of the property "in any manner, including the power to dispose of it by gift." Section 81.47a(e)(7)(iii) (Appendix, *infra*, p. 17). This language, also set forth in the 1954 Code regulations, reinforces cumulatively without any change in substance the provision of the original 1939 Code regulations, which has been retained, that the power be one "in effect, to dispose of it to whomsoever she pleases." (Appendix, *infra*, p. 16.)[5]

The wife's power in the instant case to invade the principal for her "comfort, happiness and well-being" (R. 23) clearly does not meet the requirements of the

[4] See footnote 1, *supra*.

[5] Because a bill which passed the House but failed of enactment, H.R. 8881, 85th Congress, 1st Sess., described the nature of the widow's power of appointment required for the marital deduction, as one "to dispose of it [the property] in any manner including the power to dispose of it by gift" (103 Cong. Rec. 15063), the same phrase which now appears in the regulations, petitioner argues that Congress has disapproved this requirement. This contention is plainly without merit. The phrase in question merely restates cumulatively language which was in the early regulations under 1939 Code provisions and which now appears in the present regulations. Moreover, the bill which actually became the Technical Amendments Act of 1958 in place of H.R. 8881 repeats the same basic statutory language of the 1939 Code which the regulations construe.

statute and regulations that the power be one to appoint to herself as unqualified owner. As the court below noted (Pet. 16-17), New York law, which is here applicable, imposes severe restrictions on the wife's right to exercise such a power. She does not have the power to appropriate the property to herself, and whatever remains unconsumed on her death must go over to the decedent's named remaindermen. *Matter of Britt*, 272 App. Div. 426, 71 N.Y.S. 2d 405. Her power to consume and use must be exercised fairly, honestly, and in good faith for her own use and benefit, and not to prevent any part of the principal from going to the testator's remaindermen. *Matter of Briggs*, 101 Misc. 191, 167 N.Y.S. 632, modified, 180 App. Div. 752, 168 N.Y.S. 597, affirmed, 223 N.Y. 677, 119 N.E. 1032. She may not make a charitable or other *inter vivos* gift out of the principal. *Vincent* v. *Putnam*, 127 Misc. 647, 654, affirmed, 221 App. Div. 211, affirmed with *Vincent* v. *Rix*, 248 N.Y. 76, 161 N.E. 425; *In re May's Estate*, 112 N.Y.S. 2d 847. If the property is sold by her, her executor must account for the proceeds. *Matter of Lane*, 201 Misc. 1003, 106 N.Y.S. 2d 987. Since the wife's power to consume is not sufficiently broad to enable the wife to make a gift of the property either during her life or on her death, it cannot qualify under the statute and regulations as a "power * * * [to appoint] in favor of such surviving spouse" or "in effect, to dispose of it to whomsoever she pleases". Thus, the Court of Appeals correctly affirmed the Tax Court's holding that the bequest of the decedent's residuary estate does not qualify for deduction under Section 812(e)(1)(F) of the 1939 Code.[6]

[6] That the unconsumed property may also be includible in the wife's gross estate on her death is no reason for construing the statute in such a manner as to allow a lesser power than that re-

2. There is no conflict between the decision below and that of any other Court of Appeals. Each case turns on construction of the particular will under the applicable state law. *Morgan* v. *Commissioner*, 309 U.S. 78. *Hoffman* v. *McGinnes, supra*, cited by the taxpayer (Pet. 5-7), is not in conflict with the decision below, as the Court of Appeals expressly found in its decision here, since under Pennsylvania law the will there granted the surviving spouse the power to appoint to herself as unqualified owner. The Court of Appeals for the Third Circuit in *Hoffman* found that case distinguishable on the facts from its earlier decision in *Commissioner* v. *Ellis' Estate, supra*, which is in accord with the decision below.[7]

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quired by Section 812(e)(1)(F) to qualify for the deduction. The following Courts of Appeals which have considered the question have noted that there is no necessary correlation between the marital deduction and other provisions of the estate tax. *Commissioner* v. *Ellis' Estate*, 202 F. 2d 109 (C.A. 3d); *Pipe's Estate* v. *Commissioner*, 241 F. 2d 210 (C.A. 2d), certiorari denied, 355 U.S. 814; see *McGehee* v. *Commissioner*, 260 F. 2d 818, 823 (C.A. 5th); *Starrett* v. *Commissioner*, 223 F. 2d 163, 166 (C.A. 1st). Cf. taxpayer's argument Pet. 11-12.

[7] The taxpayer cites (Pet. 7, 24-28) *Lincoln Rochester Trust Co.* v. *United States*, 188 F. Supp. 839 (W.D. N.Y.), holding that under a New York will a surviving spouse's right to the life use of the decedent's residuary estate coupled with the right to use the principal qualifies for the marital deduction. A notice of appeal has been filed by the United States and the case is now pending in the Court of Appeals for the Second Circuit. Since the case has not been briefed, it is not likely that it will be reached for argument at this term of the court. It is worthy of note that the taxpayer here petitioned the court below for a rehearing based on the decision in *Lincoln Rochester Trust Co.* v. *United States, supra*, which was handed down shortly before the decision below, and that the petition was denied. (Pet. 1-2.)

CONCLUSIÓN

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL, 1961

APPENDIX

Internal Revenue Code of 1939:

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * *

(e) [As added by Sec. 361(a) of the Revenue Act of 1948, c. 168, 62 Stat. 110, 117] *Bequests, Etc., to Surviving Spouse.*—

(1) *Allowance of marital deduction.*—

(A) *In General.*—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(B) *Life Estate or Other Terminable Interest.*—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of

the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under clauses (i) and (ii)—

(iii) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For the purposes of this subparagraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

(26 U.S.C. 195 ed., Sec. 812.)

* * * *

(F) [As amended by Sec. 93(a) of the Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606, 1668] *Life Estate With Power of Appointment in Surviving Spouse.*—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

(i) the interest or such portion thereof so passing shall, for purposes of subparagraph (A), be considered as passing to the surviving spouse, and

(ii) no part of the interest so passing shall, for purposes of subparagraph (B) (i), be considered as passing to any person other than the surviving spouse.

This subparagraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

* * * *

(26 U.S.C., Sec. 812.)

* * * *

Treasury Regulations 105, promulgated under the Internal Revenue Code of 1939:

SEC. 81.47a [As added by T.D. 5699, 1949-1 Cum. Bull. 181, and amended by T.D. 6529, 1961-9 Int. Rev. Bull. 50, 67] *Bequests, Etc., to Surviving Spouse.*—

* * * *

(c) *Marital deduction; life estate with power of appointment in surviving spouse.*—(1) *In General.*—Except as otherwise provided in subparagraph (10) of this paragraph (pertaining to estates of decedents dying after December 31, 1947, and on or before April 1, 1948), if an interest in property passes from the decedent to his surviving spouse (whether or not in trust) and the spouse is entitled for life to all the income from the entire interest or all the income from a specific portion of the entire interest, with a power in her to appoint the entire interest or the specific portion, the interest which passes to her is under

the provisions of section 812 (e)(1)(F), as amended by section 93(a) of the Technical Amendments Act of 1958, a deductible interest, to the extent that it satisfies all five of the conditions set forth below, (see subparagraph (2) of this paragraph if one or more of the conditions is satisfied as to only a portion of the interest):

(i) The surviving spouse must be entitled for life to all the income from the entire interest or a specific portion of the entire interest, or to a specific portion of all the income from the entire interest.

(ii) The income payable to the surviving spouse must be payable annually or at more frequent intervals.

(iii) The surviving spouse must have the power to appoint the entire interest or the specific portion to either herself or her estate.

(iv) The power in the surviving spouse must be exercisable by her alone and (whether exercisable by will or during life) must be exercisable in all events.

(v) The entire interest or the specific portion must not be subject to a power in any other person to appoint any part to any person other than the surviving spouse.

* * * *

(5) *Application of local law.*—In determining whether or not the conditions set forth in subparagraph (1)(i) through (v) of this section are satisfied by the instrument of transfer, regard is to be had to the applicable provisions of the law of the jurisdiction under which the interest passes * * *.

* * * *

(7) *Power of appointment in surviving spouse.*—(i) The conditions set forth in subparagraph (1) (iii) and (iv) of this paragraph, that is, that the surviving spouse must have power of appointment exercisable in favor of herself or her estate and exercisable alone and in all events, are not met unless the power of the surviving spouse to appoint the entire interest or a specific portion of it falls within one of the following categories:

(*a*) A power so to appoint fully exercisable in her own favor at any time following the decendent's death (as, for example, an unlimited power to invade); or

(*b*) A power so to appoint exercisable in favor of her estate. Such a power, if exercisable during life, must be fully exercisable at any time during life, or, if exercisable by will, must be fully exercisable irrespective of the time of her death (subject in either case to the provisions of section 81.47b(d), relating to interests conditioned on survival for a limited period); or

(*c*) A combination of the powers described under subdivisions (a) and (b) of this subdivision. For example, the surviving spouse may, until she attains the age of 50 years, have a power to appoint to herself and thereafter have a power to appoint to her estate. However, the condition that the spouse's power must be exercisable in all events is not satisfied unless irrespective of when the surviving spouse may die the entire interest or a specific portion of it will at the time of her death be subject to one power or the other (subject to the exception

in section 81.47b(d), relating to interests contingent on survival for a limited period).

(ii) The power of the surviving spouse must be a power to appoint the entire interest or a specific portion of it as unqualified owner (and free of the trust if a trust is involved, or free of the joint tenancy if a joint tenancy is involved) or to appoint the entire interest or a specific portion of it as a part of her estate (and free of the trust if a trust is involved), that is, in effect, to dispose of it to whomsoever she pleases. * * *

(iii) A power is not considered to be a power exercisable by a surviving spouse alone and in all events as required by subparagraph (1)(iv) of this paragraph if the exercise of the power in the surviving spouse to appoint the entire interest or a specific portion of it to herself or to her estate requires the joinder or consent of any other person. The power is not "exercisable in all events", if it can be terminated during the life of the surviving spouse by any event other than her complete exercise or release of it. Further, a power is not "exercisable in all events" if it may be exercised for a limited purpose only. For example, a power which is not exercisable in the event of the spouse's remarriage is not exercisable in all events. Likewise, if there are any restrictions, either by the terms of the instrument or under applicable local law, on the exercise of a power to consume property (whether or not held in trust) for the benefit of the spouse, the power is not exercisable in all events. Thus, if a power of invasion is exercisable only for the spouse's support, or only for her limited use, the power is not exercisable in all events. In order for a power of invasion to be exercisable in all events, the surviving spouse must have the unrestricted power exercisable at any

time during her life to use all or any part of the property subject to the power, and to dispose of it in any manner, including the power to dispose of it by gift (whether or not she has power to dispose of it by will).

* * * *

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IN THE

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October Term, 1960

No. 765

ESTATE OF RALPH G. MAY, MILDRED K. MAY,
Executrix,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S REPLY BRIEF

In the consideration of a Petition for Certiorari, the Court must necessarily rely in an especial way upon the briefs of the parties. Counsel for the Petitioner regrets that it is necessary to file this reply brief because the Brief for the Respondent in Opposition tends to mislead the Court, however inadvertently, by omitting in the quotation of the Statute in its brief the wording which is at the very heart of the issue.

The Respondent quotes a part of the applicable statute as follows:

> "if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, * * * with power in the sur-

viving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or the estate of such surviving spouse, or in favor of either * * *) * * *." (p. 9.)

Respondent then argues that this statute requires that the surviving spouse be able to dispose of the property "in any manner, including the power to dispose of it by gift". On the other hand, the Petitioner has argued that there is a federal concept of the required power of appointment: a power to appoint which is taxable in the gross estate of a person possessing such power and which does not require the possessor to have the power to dispose of it by gift.

On this important issue, would not it be pertinent if Congress had added the words "whether or not in each case the power is exercisable in favor of others"? Yet these are the words of Congress which Respondent has omitted from the end of the parenthetical clause.

It is difficult to imagine the justification for the Respondent in omitting this obviously pertinent language. But regardless of justification, the plausibility of the Respondent's argument that the surviving spouse must be able to dispose of the property by gift is severely diminished by the statutory language "whether or not in each case the power is exercisable in favor of others". This Court is requested to keep before it the accurate quotation of the Statute, including this clause, in considering whether to grant this petition.

The Respondent also asserts that there is no conflict between the decision below and that of the Court of Appeals for the Third Circuit in *Hoffman vs. M[illegible]nnes*, 277 F. 2d 598 (1960), which involved a Pennsylvania estate in contrast to the New York estate in the instant case.

If there is no conflict in the decision of the Court of Appeals for the Third Circuit in *allowing* the marital deduction in the case of a power "to use and spend any part or all of the principal that she may desire", and that of the Court of Appeals for the Second Circuit in *denying* the marital deduction in the case of "the right in the sole discretion of my said wife to invade and use the principal not only for necessities but generally for her comfort, happiness, and well-being", it is indeed surprising.

Respondent's attempted distinction based on state law connotations merely serves to point up the important question of whether a coordinated federal concept was intended. Further, Petitioner denies that there is a difference between New York and Pennsylvania law. This is indicated by the recent decision of the Surrogate's Court of New York County, *In re Estate of Springett*, 206 N. Y. S. 2d [redacted] 48 (1960) and the decisions of other New York Courts cited therein.

For the reasons stated herein and in the Petition, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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